DEC 19 1957
JOHN J. [illegible], Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 675

RAYMOND S. MILLER and JOSEPHINE MILLER,

and

FRANK NOWATZKI and LILLIAN NOWATZKI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. DILLON
One N. LaSalle Street
Chicago 2, Illinois
Attorney for Petitioners

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No.

RAYMOND S. MILLER and JOSEPHINE MILLER,

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Raymond S. Miller, Josephine Miller, Frank Nowatzki and Lillian Nowatzki, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in cases which were consolidated.

Judgment was entered by the United States Court of Appeals for the Seventh Circuit on July 9, 1957. Petition for rehearing, which was filed by petitioners in said United States Court of Appeals, was denied on September 20, 1957.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 247 Fed. 2d 206.

JURISDICTION.

Filed with the petition is a duly certified copy of record, which includes a copy of the judgment. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether a dividend declared payable to shareholders on the day preceding the date of declaration could be found to be income, for purposes of income tax, of parties who entered into an executory contract to buy the shares on the date of the declaration of the dividend?

2. Whether the dividend declared on shares of stock when the shares of stock were the subject of an executory contract of sale, subject to a condition precedent, could be considered income to petitioners who subsequently acquired the shares of stock?

STATUTE INVOLVED.

The statute which is involved is 28 U. S. C. (I.R.C. 1939) Sec. 22 (a).[1] In that statute it is stated that gross income includes dividends.

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[1] **Sec. 22. Gross Income.**

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

STATEMENT.

On July 29, 1950, one Clarence W. Miller was the owner of 45,500 of the 46,700 outstanding shares of Tiny Tot Safety Table Co.

On that date, an agreement was entered into by and between Clarence W. Miller as Seller; Raymond S. Miller and Frank Nowatzki as Buyers; and Tiny Tot Safety Table Co., an Illinois corporation, as the corporation. That agreement is set forth on page 15 of the joint appendix filed in the United States Court of Appeals. Form of collateral note, which was to be executed later, was attached to said agreement. This form of collateral note is shown on page 20 of said joint appendix.

The Seller and the Buyers signed said agreement. Then, on the same day, the Board of Directors of the corporation, which was controlled by the Seller, met on a waiver of notice. They authorized execution of the agreement by the corporation and, having then determined that there was a substantial earned surplus, they declared an ordinary dividend of 58¢ a share on the outstanding shares, payable to stockholders of record on July 28, 1950. Minutes of said Board of Directors appear on page 23 of said joint appendix. Thereafter, the agreement was executed by the corporation.

Dividend was paid to the Seller as evidenced by checks reproduced on pages 27 and 28 of said joint appendix.

In the agreement it was provided that as a condition precedent to the contract becoming effective the Seller and the Corporation had to furnish the Buyers with a certified balance sheet, made by the Auditor of the Corporation, as of the close of business on July 31, 1950. The Seller retained full control of the stock, of the Board

of Directors and of the Corporation until after the end of July, 1950.

The Buyers of the stock were present when the Board of Directors declared the dividend. They approved the minutes because they believed these minutes showed intentions of the parties that Seller would be subject to income tax on the dividend, for identification purposes and so that no other minutes could be substituted.

At the time of the declaration of the dividend, there had been no assignment or escrow of the stock, nor had a trust been created. At that time, Seller was in complete control of the stock, of the Board of Directors and of the corporation.

While papers were drawn in the present tense, the transaction was not completed until August 4, 1950, when the stock was transferred, as evidenced by assignment reproduced in joint appendix at page 29. Thereafter, Buyers reassigned the stock as collateral, and executed a collateral note.

Seller could not sue on the agreement until the condition precedent was performed or waived. Buyers could not sue the corporation for the dividend.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it is a decision in conflict with decisions in the same and other circuits as to when a dividend vests in a shareholder.

In *Bowers* v. *Post* (Dist. Ct. N. D. Ill. E. D. 1913) 209 F. 660, it was held that one who was a stockholder at the time of the adoption of a resolution providing for a stock dividend to holders of original stock, but subsequently transferred his stock, was entitled to retain divi-

dends. The Court said "The rights of the stockholders were fixed, the realization only being postponed; and each stockholder so surrendering his interest is entitled to payment therefor regardless of whether or not he disposed of his holdings of original shares. It was a stock dividend, and when the defendant Post sold his stock he sold it, in commercial parlance, ex-dividend." This judgment was affirmed by the Circuit Court of Appeals, Seventh Circuit, in *Bowers* v. *Post*, 220 Fed. 1006.

In *Shinsaku Nagano* v. *McGrath*, U. S. Court of Appeals, Seventh Circuit, Feb. 26, 1951, 187 F. 2d 753, comment is made on the Uniform Stock Transfer Act, effective in Illinois, and it was held that title to a certificate of stock and to the shares represented thereby could be transferred only by delivery of the certificate properly endorsed or by delivery of the certificate and a separate written assignment or power of attorney.

In the case of *In re Sutherland*, Circuit Court of Appeals, Second Circuit, 23 F. 2d 595, 599, it is said "A stockholder has a vested interest in the corporate profits by virtue of the stock ownership, and when a dividend is declared, and a segregation thereof is made to the amount of the dividends, the amount thereof is held by the corporation as trustee for the stockholder."

In *Southbine* v. *Stroud*, Circuit Court of Appeals, Second Circuit, 5 F. 2d 809, question arose as to the validity of a contract to buy stock of a corporation. The Court held that the contract was made and completed on June 2, 1923, as evidenced by broker's slips and notes though payment was not made until June 5, 1923. It held that dividends which had been declared prior to the making of the contract, if any, would remain the property of the Seller after the performance of the agreement and those

declared by the corporation after the making of the contract on June 2, 1923, would become the property of the purchaser.

The Court, in the case of *Buchanan* v. *National Savings & Trust Co.*, Court of Appeals of District of Columbia, 23 F. 2d 994, stated that it had long been the custom of directors to declare distinctly that the dividend shall be made to stockholders of record on a specified day and that the rule that a dividend belonged to the owner of the shares at the time the dividend was declared did not obtain where at the time the dividend was declared it was made payable to stockholders of record at a future date.

The decision below is contrary to United States Supreme Court decisions and a decision of the United States Court of Appeals, Seventh Circuit, wherein credence is given to conditions precedent as to determination of rights of shareholders. Therefore it should be reviewed.

In *Jones* v. *United States*, 96 U. S. 24, a contract contained a provision that goods must be delivered or tendered on the day specified in the contract. The Court stated "* * * where the right to demand the performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract."

Also note *Ware* v. *Allen*, 128 U. S. 590 where a note was held unenforceable because a condition had not been

met. The note contained the condition "Provided we are not defeated in the suit against T. P. Ware."

In the case of *Burke* v. *Dulaney*, 153 U. S. 228, action had been started by the payee of a negotiable note against the maker. The Court held as admissible evidence to show a parol agreement between the parties made at the time of the giving of the note that it should not become operative as a note until the maker could examine the property for which it was to be given. The evidence offered tended to show, Justice Harlan stated "that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor * * * but was * * * to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question."

The United States Court of Appeals, Seventh Circuit, in the case of *Getz* v. *City of Harvey*, 118 F. 2d 817 interpreted a contract in which it was provided that it was subject to and dependent upon the ability of the defendant to purchase and deliver certain outstanding securities. The Court held that parties had no right of action for breach of contract or to have the Court declare a trust by virtue of conditional contracts which, because of failure of prescribed conditions, never come into effective legal existence.

The decision below is contrary to principles established by income tax ruling and by United States Court of Appeals cases in the Seventh and other circuits for determination of whether or not the purchaser of stock under contract has such complete beneficial ownership to make him liable for income tax on the dividend.

The intention of the parties is the controlling factor. In *Vermont Transit Co. v. Commissioner*, Circuit Court of Appeals, Second Circuit, 218 F. 2d 468, it is stated that this intent may be inferred from the wording of the agreement and from the surrounding circumstances.

In the case of *Northern Trust Company of Chicago* v. *United States*, United States Court of Appeals, Seventh Circuit 193 F. 2d 127, a seller deposited endorsed certificates of stock with a bank in escrow and the buyer deposited installment notes in said escrow. The seller could demand payment of the purchase price and the buyer could demand delivery of the stock to him on payment of the price agreed upon. The Court found that the purchaser was the beneficial owner of the stock entitled to the dividend to be applied on the purchase price.

In Revenue Ruling 56-153, 1956-1, Cum. Bull. 166, the ruling which was requested was in the case in which a sale of stock had been consummated, in which the buyer was unconditionally liable on installment notes, in which, at the time of sale, entries had been made on the books of the corporation indicating transfer of the stock and in which, concurrently with the sale, a collateral trust agreement had been executed. In that case it was provided that dividends be paid out of future earnings quarterly for payment on notes and it was provided that payments (out of dividends) be applied on principal and interest.

In the case of *DeGuire* v. *Higgins*, Circuit Court of Appeals 2d Cir. 159 F. 2d 921 an escrow agreement was made between a seller and a buyer. The seller deposited endorsed certificates of stock and the buyer deposited certain installment notes. The escrowee was instructed to deliver the certificates to the purchaser as the notes were paid. It was provided in said agreement that all

dividends which might be paid during the life of the agreement be credited upon the principal and interest of the next one of the notes thereafter to become due. In this case the Court stated that it was a question of intention.

Also, in *Moore* v. *Commissioner*, United States Court of Appeals, Seventh Circuit, 124 F. 2d 991, the seller deposited endorsed certificates of stock with a bank in escrow and the buyer deposited installment notes in said escrow. There was a positive undertaking to sell upon the one party and a positive undertaking to buy on the other side.

In all these cases to determine which party possessed beneficial ownership at the time of the dividend, the Courts considered rights and circumstances. These rights and circumstances are the right to vote the stock, the right of control over declaration of dividend, the right of control over officers, policies and management of the corporation and the right of the parties to enforce the contract. Consideration is given to whether or not stock certificates were out of the control of the seller before the dividend was declared.

These important questions should be settled by this Court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN J. DILLON
One N. LaSalle Street
Chicago 2, Illinois
Attorney for Petitioners

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

September Term, 1956, April Session, 1957

No. 11956
Clarence W. Miller and
Emma L. Miller,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

No. 11957
Commissioner of Internal Revenue,
Petitioner,

v.

Raymond S. Miller and
Josephine Miller,
Respondents.

No. 11958
Commissioner of Internal Revenue,
Petitioner,

v.

Frank Nowatzki and
Lillian Nowatzki,
Respondents.

Petition for Review of Decisions of the Tax Court of the United States.

July 9, 1957

Before Duffy, *Chief Judge*, Major and Finnegan, *Circuit Judges.*

Finnegan, *Circuit Judge.* These multiple appeals arise out of a decision of the tax court, reported as *Miller, et al.*

v. *Commissioner*, 26 T. C. 16 (1956), holding the dividends involved taxable as ordinary income to the seller of the stock of Tiny Tot Safety Table Company, an Illinois Corporation. Deficiencies in income taxes for the year 1950 are involved. That the dividend was taxable to the seller was the chief contention of the Commissioner who, as he asserts through his brief, "being charged with the duty of collecting the revenue is occasionally required to take inconsistent positions in order to conform to his duty. The present consolidated proceeding presents such a problem. The Commissioner believes the Tax Court was correct and would not have appealed in the case of the buyers had not the seller filed a petition for review." In short, we are told this "dividend was inexorably income to someone." Accordingly, the Commissioner filed a protective appeal against the buyers Raymond S. Miller, Josephine Miller, Frank Nowatzki, Lillian Nowatzki when Clarence W. and Emma Miller took their appeals. The Tax Court had sustained the Commissioner's determination of deficiencies against the seller Clarence W. and his wife, Emma Miller, and reversed the Commissioner's action against the buyer, Raymond S. and his wife, Josephine Miller and the other buyer, Frank and Lillian Nowatzki, his wife.

Documentary evidence forms all of the record in this case and since the written agreement between seller and buyer, the corporate resolution and the marginal notation in the minute book are each fully reprinted in the Tax Court's opinion, it is unnecessary to again reproduce them. The short of it is in the Tax Court's view of the exhibits, that the seller was the person in possession of the legal title, to the corporate stock, and held beneficial ownership of the shares at the time of the dividends.

The seller owned 45,500 shares of 46,700 shares of the issued and outstanding capital stock of Tiny Tot Table Company, and he also owned the patent rights to manufacture, use, and sell Tiny Tot Safety Tables and accessories. On July 29, 1950, the seller contracted with buyers for the sale of the stock and patent rights not theretofore

assigned to the corporation. On that same day, July 29, 1950, the directors of Tiny Tot, upon written waiver of notice, held a special meeting for the purpose of considering the sales agreement and declaration of dividends. This meeting was held and the directors, in substance, declared a dividend of 58¢ per share on the 46,700 shares payable August 4, 1950 to stockholders of record on July 28, 1950. By their notation on the last page of that resolution, the buyers approved the action.

Later, on August 4, 1950, the seller made a written assignment of his shares to the buyers. The seller received the declared dividends through two checks dated August 7, 1950 in the amounts of $7,623.97 and $18,766.03. In his 1950 tax return, filed jointly with his wife, the seller reported a net long-term capital gain from the sale of his stock which was disallowed by the Commissioner who treated the amount of dividend as ordinary income. On the other hand when the buyers filed their 1950 returns, jointly with their respective wives, they omitted the dividends which precipitated the Commissioner's notice of deficiency and inclusion of one-half of the dividends in the incomes of each buyer.

Normally income derived from property is attributable to the owner of the income producing item, for income tax purposes. We think consistency of decision in the federal tax field is indispensable for taxpayers and their advisers who need to predict the tax consequences of their transactions. Yet what frequently appears, on cursory examination, as a sport among tax case precedent is actually a permutation spawned by the peculiar facts of some particular case. To be sure, lurking in the volumes of reports there are, often, some bizarre results arising out of judicial struggles for an opinion based on the choice of the taxable person from among several engaged in the transactional shift of income-producing property. The case now before us is a striking example of an instance where view-point and emphasis of this or that fact could change the result for, as we have said, the decision pivots on the meaning extracted from several documents.

Reduced to its lowest terms, the essential facts, expose this problem: B and C, together, executed a sales contract with A to buy from A his shares of stock in T Corporation. The agreement provided for redelivery and reassignment of those shares to A as collateral security for the purchase price payable by B and C. Later on the same day when the contract was signed, T corporation declared a cash dividend payable to stockholders of record on the day preceding. Shortly afterward A formally assigned his stock to B and C, which action was followed by delivery of T corporation's dividend checks to A. Which of the parties A or B and C, received these dividends as ordinary taxable income? Section 22(a), Internal Revenue Code of 1939, 26 U. S. C. § 22 (1952).

According to the Tax Court the incidence of this tax fell upon A and we disagree. Only by reading and interpreting the documentary exhibits, and giving the words their natural meaning, can the choice of the taxable person or persons be made in this case. Beyond dispute B and C were obligated to pay A the purchase price for which they had committed themselves. Each of them (Nowatzki and Miller) approved the declaration of dividends and thereby claimed its benefit. That these dividends were used to reduce the unpaid portion of the purchase price is hardly a forlorn possibility, indeed A's prompt assignment to B and C is consistent with that view we take of the relevant documents. At least we have an objective fact, *i. e.*, payment of dividends to A and his assignment of stock to B and C. *Lee* v. *Commissioner*, 143 F. 2d 4 (7th Cir. 1944). Otherwise the case would be resolved on subjective considerations obscured by the tense of verbs in the contract of sale. We think the buyers are taxable on these dividends because, in the last analysis they were applied on the purchase price. *De Guire* v. *Higgins*, 159 F. 2d 921, 925 (2nd Cir. 1947). On course what we have just held collides with this passage in the Tax Court's opinion:

> " . . . here the seller himself made a formal assignment of the shares to the buyers 6 days after the agreement was executed and the dividend declared. The most plausible inference to be drawn from this,

we think, is that the seller had ownership and control of the shares when the dividend was declared; this being so, the dividend that was declared payable to him (as record owner of the shares on July 28, 1950) and that was actually paid to him, should probably be included in his income in the year received.

The fact that the parties in one part of their agreement included the dividend as part of the purchase price of the shares does not necessarily alter the tax consequences of its payment. In another part of the agreement it was provided that the dividend in question was to be paid to the seller and was to "apply on or reduce said sale price (of the stock) in such amount." This, we think, is the essence of the transaction: The corporation had a substantial earned surplus accumulation at the time; such surplus was available to the then stockholder (the seller); a dividend from the surplus was declared on the same day that the agreement to sell was entered into and while the seller was still in control of the corporation; this dividend was specifically made payable to stockholders of record the day before the date of the agreement (again, the seller); and the dividend was so paid, and according to the agreement, the amount of the dividend reduced the sale price of the stock. On these facts, the dividend was the seller's and was properly taxable to him."

After all A was holding the shares as collateral pending payment of the purchase price. The timing of voting the dividends is equivocal. We are not brushing aside the resolution's clear provision for payment of dividends to stockholders on the day before the dividend was declared but reading it along with the marginal notation of approval by the buyers (B and C). If they were uttter strangers to the ownership of this stock we perceive no sound reason for having them acquiesce on the dividend resolution.

Our earlier decisions, *Moore* v. *Commissioner*, 124 F. 991 (7th Cir. 1941) and *Northern Trust Co. of Chicago* v.

United States, 193 F. 2d 127 (7th Cir. 1952) are consistent with the result we have reached in this appeal. See also: Rev. Rul. 560153, 1956-1 Cum. Bull. 166 following out the capital asset concept for a vendor of stock on which dividends are declared. Because *Hulbert* v. *Commissioner*, 227 F. 2d 399 (7th Cir. 1955), cited to us by the government, involves a partnership we need not further distinguish it.

We hold these dividends were not ordinary income to the seller but were as to the buyers. Accordingly, we reverse the appeals of: Raymond S. Miller and Josephine Miller (No. 11957), and Frank Nowatzki and Lillian Nowatzki (No. 11958) and reinstate the Commissioner's determination of deficiencies against them.

We further hold that Clarence W. and Emma L. Miller received the dividends as part of the proceeds of sale with a consequent capital gain and on this phase of the opinion brought here for review the tax court decision is also reversed.

DUFFY, *Chief Judge*, dissenting.

The dividend in question was declared payable to stockholders of record as of July 28, 1950. Although the agreement is cast in the present tense, an examination of the contract as a whole in view of the surrounding circumstances, convinces me the parties did not intend a present sale.

There was no transfer of legal title to the shares at the time of the agreement. There was no delivery of the shares, constructive or otherwise, to the buyers. There was no transfer of the shares on the books of the company. During the critical period the seller not only retained title to the stock, but possessed full and complete beneficial ownership. I would affirm the decision of the Tax Court.

No. 675

In the Supreme Court of the United States

OCTOBER TERM, 1957

RAYMOND S. MILLER AND JOSEPHINE MILLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

FRANK NOWATZKI AND LILLIAN NOWATZKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

HARRY BAUM,
MELVIN L. LEBOW,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OCTOBER TERM, 1957

No. 675

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court are reported at 26 T.C. 151. The opinion of the Court of Appeals (Pet. 1a-6a) is reported at 247 F. 2d 206.

JURISDICTION

The judgments of the Court of Appeals were entered on July 9, 1957. (R. 61-62.) The taxpayers' petition for rehearing filed with the Court of Appeals was denied on September 20, 1957. (R. 63.) The petition for a writ of certiorari was filed on December 19, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that, under the terms of a contract for the sale of stock and the surrounding circumstances, a dividend paid on the stock and applied against the purchase price constituted dividend income to the purchasers, not to the seller.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1952 ed., Sec. 22 (a).)

STATEMENT

The facts, as found by the Tax Court (R. 32-40), may be summarized as follows:

The seller[1] was the owner of 45,000 shares of a total of 46,700 shares of issued and outstanding stock of Tiny Tot Safety Table Company, an Illinois corporation. (R. 32.)

On July 29, 1950, the seller entered into a written contract with the buyers providing for the sale of his stock in the Company. (R. 32.) The written agreement in pertinent part reads as follows (R. 32-33, 34-35):

> 1. Seller hereby sells, assigns and delivers to Buyers 45,500 shares of stock of the Corporation and all his rights in letters patent No. 2461123 not heretofore assigned to the Corporation.
>
> 2. Said 45,500 shares of stock of the Corporation are herewith redelivered to Seller and reassigned by Buyers to Seller as collateral security for the payment of Forty-three Thousand Five Hundred ($43,500.00) Dollars as hereinafter provided.
>
> 3. Buyers have made an initial payment of Two Thousand ($2,000.00) Dollars, receipt of which is hereby acknowledged by Seller. Buyers agree to pay to Seller the balance of Forty three Thousand Five Hundred ($43,500.00) Dollars as follows:
>
> (a) The sum of Ten Thousand ($10,000.00) Dollars shall be paid by Buyers to Seller on or before August 15, 1950;

[1] The term "seller" refers to Clarence W. Miller, and the term "buyers" refers to the petitioners Raymond S. Miller and Frank Nowatzki, all of whom were parties to the consolidated proceedings in both the Tax Court and the Court of Appeals. Since their wives are parties only because joint returns were filed for the taxable year, the terms do not have reference to them.

(b) Cash of the Corporation on hand at the close of business on July 31, 1950, less accounts payable as shown on balance sheet as of July 31, 1950, hereinafter referred to, and a further amount in cash equivalent to the amounts due to the Corporation from Tiny Tot Safety Table, Eastern Co., as of the close of business on July 31, 1950, are to be distributed to the shareholders pro rata—through reduction of stated capital and liquidating dividend or through means approved by the Secretary of State—and amounts received thereby on the 45,500 shares of Seller are to be paid to seller and shall apply on or reduce said sale price in such amount;

* * * * *

4. As a condition precedent to this agreement becoming effective, Seller and the Corporation shall furnish Buyers with a certified balance sheet, made by the Auditor of the Corporation, as of the close of business on July 31, 1950, which balance sheet shall be accepted by Buyers as their understanding of the status of the Corporation. Seller shall warrant on said balance sheet that it is true and correct. Should liabilities arise on transactions made prior to July 31, 1950, or on matters which occurred prior to July 31, 1950, Seller shall be liable therefor to the extent that his 45,500 shares (being sold hereby) bears a proportionate part to the 46,700 shares issued and outstanding as of the date of this agreement.

5. Seller, in addition to the provisions of said collateral installment note, which he may exercise independently of the provisions hereof, shall have the following rights:

(a) Seller shall vote the shares of stock of the Corporation held by him as collateral as fully and completely as though he were the owner thereof;

(b) Seller shall elect two of the five directors of the Corporation so long as Buyers are not in default in the making of payments hereunder, and so long as Buyers are not guilty of a breach of any agreement hereunder; and Seller shall elect three of the five directors should Buyers be in default for twenty days or more in the making of any payment hereunder or be guilty of a breach of any agreement hereunder;

(c) The balance due shall at all times be a first and prior lien on the earnings of Buyers with the Corporation;

(d) Should there be default in the making of any payment, the Corporation shall make no payment to Buyers for salary or commission;

(e) Buyers will at no time bind the Corporation to any obligation of any kind, nor will they cause any of the assets of the Corporation to be subjected to any lien or mortgage of any kind, without the written consent of Seller;

(f) Until Buyers have paid Seller in full, disbursements of the Corporation for rent, sal-

aries and other expenses shall not exceed $1,500.00 a month, unless Seller shall agree in writing to disbursements in excess thereof;

(g) Until Buyers have paid Seller in full, Buyers shall make no loan from the Corporation;

(h) Buyers shall furnish the necessary working capital for the Corporation should funds other than earnings be needed;

(i) Until Buyers have paid Seller in full, the Corporation will not issue additional shares;

(j) The certificates of stock to be held as collateral shall bear a legend that the certificates are subject to all of the terms and conditions of this agreement;

(k) Buyers shall have the right to pay off the entire amount owed by them to Seller at any time, without premium.

* * * * *

The contract was signed by the parties, and again by the seller as president of Tiny Tot Safety Table Company. (R. 36.) On July 29, 1950, the directors of the corporation held a meeting at the office of the corporation for the purpose of considering the agreement made between the seller and the buyers and to consider a declaration of dividends. (R. 22.) The minutes of that meeting, in pertinent part, read as follows (R. 37):

Be It Resolved, Therefore, that the president and secretary of this corporation, be, and they are hereby authorized, empowered and instructed on

behalf of this corporation to enter into and execute the agreement made this 29 day of July, 1950, by and between Clarence W. Miller, as seller; Raymond S. Miller, and Frank Nowatzki, as buyers, and this corporation, copy of which agreement is attached following minutes of this meeting.

The directors noted the provision in the above agreement that it was contemplated a liquidating dividend would be declared by the corporation and that such liquidating dividend would apply on or reduce the sale price in such amount. A check of the books showed an earned surplus account about the size of the bank account. This surplus had been retained for working capital deemed necessary because of changes in the main product of the corporation, the development of optional extension legs and problems of manufacture, storage and warehousing throughout the country on credit sales. The directors noted further that Raymond S. Miller and Frank Nowatzki have obligated themselves to supply necessary working capital for the corporation should funds other than earnings be needed. In view of the above, on motion duly made and seconded, the following resolution was unanimously adopted:

> Resolved that the Board of Directors of Tiny Tot Safety Table Co. declare a dividend of 58¢ a share on the outstanding 46,700 shares of the capital stock of this corporation to stockholders of record on July 28, 1950, payable August 4, 1950, out of the earnings or surplus of this corporation.
>
> Resolved Further, that no recommendation be made to the shareholders for the declaration of

> any liquidating dividend, the parties to the agreement attached following these minutes having approved this resolution.
>
> * * * * *

The buyers' approval of the declaration of the dividend was registered on the margin of the last page of the minutes. (R. 38.)

On August 4, 1950, the seller executed the following assignment (R. 38):

> For Value Received, I hereby sell, assign and transfer unto Frank M. Nowatzki and Raymond S. Miller 45,500 shares of stock of Tiny Tot Safety Table Company, represented by the following certificates:
>
> > [Listing of names on share certificates, the numbers of the shares, and the number of shares in each name]
>
> * * * * *

The seller received the dividend mentioned in the minutes in the form of two checks dated August 7, 1950. (R. 39.)

In their returns for 1950, made jointly with their wives, the buyers did not report the dividend as income received by them. In his notices of deficiency, the Commissioner included one-half of the amount of the dividend in the income of each buyer. (R. 39.)

In his return for 1950, made jointly with his wife, the seller reported the dividend as a net long-term capital gain from the sale of his stock. In his notice of deficiency, the Commissioner disallowed the capital

gains treatment and treated the amount of the dividend as ordinary income. (R. 39.)

The Tax Court held that the dividend was taxable as such to the seller, not to the buyers. (R. 40-48.) The seller appealed and, in order to protect the revenue, the Commissioner filed protective cross-appeals in the cases of the buyers. The Court of Appeals reversed (one judge dissenting), holding that the dividend was taxable to the buyers and that, as to the seller, the dividend represented a portion of the purchase price (taxable as capital gain). (Pet. 1a-6a.)

ARGUMENT

1. It is settled that taxation is not so much concerned with refinements of title as with the beneficial ownership of property or its income. *Griffiths* v. *Commissioner*, 308 U. S. 355, 357. Accordingly, the determination of who is taxable on dividends paid on shares of stock which are the subject of an executory contract of sale—the seller or the buyer—depends upon which of them derived the economic benefit of the payment, and this in turn depends upon a practical view of the contract and the circumstances of the particular case, no one circumstance being controlling. *Northern Trust Co. of Chicago* v. *United States*, 193 F. 2d 127 (C.A.7th), certiorari denied, 343 U. S. 956; *DeGuire* v. *Higgins*, 159 F. 2d 921 (C.A.2d), certiorari denied, 331 U. S. 858; *Moore* v. *Commissioner*, 124 F. 2d 991 (C.A.7th).

Both courts below agreed with these principles but differed as to the construction to be placed upon the documents as a whole, each emphasizing different provisions and circumstances. While we believe that the Tax Court's conclusion that the seller remained the

beneficial owner of the stock is a reasonable one (since at the time of the dividend the seller not only retained legal title but the right to vote the stock), and so contended in the court below, it cannot be said that the contrary interpretation adopted by the Court of Appeals is not also a permissible one.

The Court of Appeals placed great emphasis on the facts that the contract provided that the dividend should be applied against the purchase price and that the buyers approved the dividend. (Pet. 4a, 5a.) The fact that the seller, according to the contract, merely held the stock as security for payment of the purchase price until he was credited with the dividend was also considered significant by the Court of Appeals. These uncontroverted facts furnish substantial support for its conclusion that the dividend was paid to the seller not as a dividend, but as part of the purchase price due him under the contract of sale, and, therefore, that the buyers received the actual benefit for which the tax should be paid. (Pet. 4a.) The conclusion it reached is consistent with cases which hold that the seller of stock is not liable for the ordinary dividend tax when he does not receive the dividend as such, but as part of the purchase price under the contract of sale. *Northern Trust Co. of Chicago* v. *United States*, 193 F. 2d 127 (C.A.7th), certiorari denied, 343 U. S. 956; *Moore* v. *Commissioner*, 124 F. 2d 991 (C.A.7th).

Since the question in this type of case is essentially factual, and since the decision of the Court of Appeals is a reasonable one, we submit that the issue presented is not one that warrants review by this Court.

2. There is no conflict of decisions. Since determination of the question depends upon the construction of the particular agreement in issue and the peculiar facts

of the case, petitioners' contention (Pet. 8-9) that the decision below is contrary to the decisions in *Northern Trust Co. of Chicago* v. *United States*, 193 F. 2d 127 (C.A. 7th), certiorari denied, 343 U.S. 956, and *Moore* v. *Commissioner*, 124 F. 2d 991 (C.A. 7th), is plainly without merit. Moreover, those cases were decided by the same court that decided the present case and, as pointed out *supra*, they are in accord with the instant decision in principle.[2]

There is likewise no conflict with *Shinsaku Nagano* v. *McGrath*, 187 F.2d 753 (C.A. 7th) (Pet. 5); *Buchanan* v. *National Savings & Trust Co.*, 23 F. 2d 994 (C.A. D.C.) (Pet. 6); *In re Sutherland*, 23 F. 2d 595 (C.A. 2d) (Pet. 5); *Saulbine* v. *Stroud*, 5 F. 2d 809 (C.A. 8th) (Pet. 5); and *Bowers* v. *Post*, 209 Fed. 660 (N.D. Ill.), affirmed *per curiam*, 220 Fed. 1006 (C.A. 7th) (Pet. 4), none of which are tax cases. Those cases apply the general principle that a corporate dividend belongs to the owner of shares at the time of the dividend, and concern themselves with the question of legal title to shares of stock under local law. As stated previously, tax liability under the revenue statutes is not dependent upon refinements of legal title; although possession of legal title is an item to consider in the determination of the present controversy, it is not at all controlling.

The same observations hold true for petitioners' reliance (Pet. 6-7) on *Burke* v. *Dulaney*, 153 U. S. 228;

[2] Petitioners also rely (Pet. 8) upon *DeGuire* v. *Higgins*, 159 F.2d 921 (C.A. 2d), certiorari denied, 331 U.S. 858, but that decision merely concerned the buyer in the same transaction involved in *Moore* v. *Commissioner*, 124 F. 2d 991 (C.A. 7th). In the *Moore* case, the Seventh Circuit decided that the dividend in question was not taxable to the seller of the stock, and the Second Circuit in the *DeGuire* case followed the *Moore* case and taxed the dividend to the buyer. The decision below is thus in complete accord with that decision.

Jones v. *United States*, 96 U.S. 24; and *Getz* v. *City of Harvey*, 118 F. 2d 817 (C.A. 7th), certiorari denied, 314 U. S. 628, which likewise are not tax cases but concern causes of action *ex contractu*, dealing merely with the interpretation of conditions precedent found in ordinary contracts.

CONCLUSION

The case presents a factual question the disposition of which is dependent upon the terms of a particular agreement and set of surrounding circumstances. There is no conflict of decisions. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HARRY BAUM,
MELVIN L. LEBOW,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 675

RAYMOND S. MILLER and JOSEPHINE MILLER

and

FRANK NOWATZKI and LILLIAN NOWATZKI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. DILLON
One N. LaSalle Street
Chicago 2, Illinois
Attorney for Petitioners

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Raymond S. Miller, Josephine Miller, Frank Nowatzki and Lillian Nowatzki, petitioners, filed herein their petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. This petition was denied on February 3, 1958.

Petitioners now respectfully request rehearing of the order denying the petition for certiorari on grounds of substantial and controlling effect set forth herein.

STATEMENT.

The Tax Court of the United States held a dividend taxable as ordinary income to the seller of stock, since he owned and controlled the shares at the time the dividend was declared, and the dividend was made payable to and paid to him (Joint Appendix, page 30).

In that opinion (Joint Appendix, page 40), Judge Tietjens stated that the agreement for the sale of stock was dated July 29, 1950; that the dividend was declared the same day, made payable on August 4, 1950, out of the earned surplus of the corporation, to the shareholders of record on July 28, 1950.

That Court stated that the reasoning in cases cited was helpful (Joint Appendix, page 43). Based on these decisions, the Judge of the Tax Court found that there had been no intention to make a transfer of ownership of the stock prior to the declaration of the dividend; that the seller executed an assignment and transfer of the shares on August 4, 1950, bearing out that it was not intended that ownership of shares be passed upon execution of agreement of sale; that the parties did not consider the transaction consummated at the time the agreement of sale was executed because of the holding of the special meeting of the board of directors of the corporation to give consent to the sale; and that something more than the mere execution of the agreement was to be done before the agreement would become effective, there being a provision that as a condition precedent to the agreement's becoming effective, the seller and the corporation had to furnish buyers with a certified balance sheet of the business as of July 31, 1950.

From the Tax Court decision (Joint Appendix, page 45), we quote:

"The inference we draw from the circumstances of the agreement that we have dwelt upon is that it was not the intention of the parties that ownership of the stock in question should pass upon execution of the agreement and that beneficial ownership was not in the buyers when the dividend was declared. In our view these circumstances point up the difference between this case and *Moore* v. *Commissioner, supra.* One ground for the Court's decision in *Moore*, as we have pointed out, was that at the time the dividend was declared, the stock being sold was completely beyond the seller's control and nothing further remained for her to do to divest herself of title to the shares. Here it is apparent that such was not the case; here the seller himself made a formal assignment of the shares to the buyers six days after the agreement was executed and the dividend declared. The most plausible inference to be drawn from this, we think, is that the seller had ownership and control of the shares when the dividend was declared; this being so, the dividend that was declared payable to him (as record owner of the shares on July 28, 1950) and that was actually paid to him, should properly be included in his income in the year received.

"The fact that the parties in one part of their agreement included the dividend as part of the purchase price of the shares does not necessarily alter the tax consequences of its payment. In another part of the agreement it was provided that the dividend in question was to be paid to the seller and was to 'apply on or reduce' said sale price (of the stock) 'in such amount.' This, we think, is the essence of the transaction: the corporation had a substantial earned surplus accumulation at the time; such surplus was available to the then stockholder (the seller); a dividend from the surplus was declared on the same day that the

agreement to sell was entered into and while the seller was still in control of the corporation; this dividend was specifically made payable to stockholders of record the day before the date of the agreement (again, the seller); and the dividend was so paid, and according to the agreement, the amount of the dividend reduced the sale price of the stock. On these facts, the dividend was the seller's and was properly taxable to him. * * *.

"In addition to what has been said above in distinguishing the case before us from those relied on by the seller, we point out that those cases involved situations where the stock sold was either placed in escrow or held as collateral by the seller until the purchase price, part of which was to be paid from dividends subsequently declared and at a time when the purchaser was in control of the stock, was paid. The dividends subsequently paid were held taxable to the purchaser. Here the dividend was declared on the same day as the sales agreement, made payable to the person who owned the shares on the day prior to the date of the agreement. The two situations call for different tax consequences."

* * *

Reference is made to the decision of the United States Court of Appeals for the Seventh Circuit (Appendix, page 2a), in which Judge Finnegan states:

"That the dividend was taxable to the seller was the chief contention of the Commissioner who, as he asserts through his brief, 'being charged with the duty of collecting the revenue is occasionally required to take inconsistent positions in order to conform to his duty. The present consolidated proceeding presents such a problem. The Commissioner believes the Tax Court was correct and would not have appealed in the case of the buyers had not

the seller filed a petition for review.' In short, we are told this 'dividend was inexorably income to someone.' Accordingly, the Commissioner filed a protective appeal against the buyers Raymond S. Miller, Josephine Miller, Frank Nowatzki, Lillian Nowatzki when Clarence W. and Emma Miller took their appeals."

* * *

Before the United States Court of Appeals for the Seventh Circuit, the Brief for the Commissioner contains a statement as follows:

"At the time of the dividend the seller had legal title to the shares, his name was on the corporate books as owner, and he possessed the power to vote, without limitation, 45,500 of the 46,700 shares outstanding of the corporation. In addition, he was in full control of the management and policies of the corporation. Indeed, he had possession and control of the shares themselves. Moreover, at the time of the dividend the seller had no right to sue for the purchase price, and the buyers, under the contract, were under no present obligation to pay the balance of the contract price. The seller was also the party who was to bear any liabilities arising from the ownership of the shares.

"On this evidence the Tax Court, following this Court's decisions in *Moore and Northern Trust Co. of Chicago*, and that of the Second Circuit in *DeGuire*, correctly found the dividend taxable income to the seller, as the party in possession of the legal title and beneficial ownership of the shares at the time of the dividend.

"The Commissioner believes the decisions of the Tax Court were correct. The dividend, however, was income to someone, *i.e.*, either the seller or buyers of the shares. Therefore, if this Court should reverse the Tax Court's

decision against the seller, it should find in favor of the Commissioner on his protective appeal against the buyers."

Propositions of law relied upon by the Commissioner in said brief are as follows:

"1. There is no sale of shares of stock where there is no transfer of the shares on the books of the corporation and no delivery of the shares to the buyers, and under the contract to sell the buyers are not liable to pay the balance of the purchase price.

Shinsaku Nagano v. *McGrath*, 187 F. 2d 753 (C.A. 7th).

Nolan v. *American Telephone & Telegraph Co.*, 326 Ill. App. 328, 61 N.E. 876.

"2. A party bound to perform a condition precedent found in a contract cannot sue on the contract without proof that he has performed the condition.

Burke v. *Dulaney*, 153 U.S. 234.

Ware v. *Allen*, 128 U.S. 540.

Jones v. *United States*, 96 U.S. 24.

Lilly v. *Haynes Co-op. Coal Mining Co.*, 56 N.D. 465, 196 N.W. 556.

McIsaac v. *Hale*, 104 Conn. 374, 132 Atl. 916.

Mumaw v. *Western & Southern L. Ins. Co.*, 97 Ohio 1, 119 N.E. 132.

"3. Where there exists an executory contract for the sale of shares of stock, a dividend declared thereon is income to the owner of the shares; the owner of the shares for tax purposes is the party possessing the more substantial attributes of ownership at the time of the dividend.

Northern Trust Co. of Chicago v. *United States*, 193 F. 2d 127 (C.A. 7th), certiorari denied, 343 U.S. 956.

Moore v. *Commissioner*, 124 F. 2d 991 (C.A. 7th).

DeGuire v. *Higgins*, 159 F. 2d 921 C.A. 2d).

"4. The intention of the parties is the controlling factor and such intent may be inferred from the wording of the agreement and from the surrounding circumstances.

Vermont Transit Co. v. *Commissioner*, 218 F. 2d 468 (C.A. 2d).

"5. Among the circumstances to consider in a determination of which party possessed the more substantial attributes of ownership in the shares at the time of the dividend are:

The right to vote the stock;

The right of control over officers, policies and management of the corporation;

Whether or not the shares were out of the seller's control (*i.e.*, endorsed in blank and delivered to the buyer or to an escrow agent on behalf of the buyer) during the time of the dividend;

Whether or not the seller was bound by the contract to credit the dividend in satisfaction of the buyer's obligation to pay the purchase price.

Northern Trust Co. of Chicago v. *United States*, 193 F. 2d 127 (C.A. 7th), certiorari denied, 343 U.S. 956.

Moore v. *Commissioner*, 124 F. 2d 991 (C.A. 7th).

DeGuire v. *Higgins*, 159 F. 2d 921 (C.A. 2d).

"6. No single circumstance is controlling. The incidence of tax falls upon the party who possesses the more substantial attributes of ownership at the time of the dividend.

Hulbert v. *Commissioner*, 227 F. 2d 399 (C.A. 7th).
Northern Trust Co. of Chicago v. *United States*, 193 F. 2d 127 (C.A. 7th) certiorari denied, 343 U.S. 956.
Moore v. *Commissioner*, 124 F. 2d 991 (C.A. 7th).
DeGuire v. *Higgins*, 159 F. 2d 921 (C.A. 2d).

The Commissioner in the argument in said brief states:

"* * * The seller had full control of the stock, had the right to vote the stock as he saw fit, and had control of the management, policies and officers of the corporation; indeed, he had all this and legal title as well."

In commenting upon the dividend, the Commissioner in his brief concludes that July 28, 1950, is the crucial date and, after citing decisions, makes comments:

"Indeed, under Illinois law the buyers here could not be heard to say that the dividend was theirs. Since the buyers and the seller as well, agreed that the dividend be that of shareholders of record as of July 28, 1950, neither could therefore, subsequently take a different position when it appeared more favorable to do so."

"Aside from this, even if the crucial date was July 29, 1950, the result would be the same, for the essential circumstances remained the same."

On the matter of the condition precedent, the Commissioner in said brief states:

"It may do well to point out at this time that we here arrive at a juncture between this case and cases like *Northern Trust Co. of Chicago.* Here the buyers were not bound to pay the balance of the purchase price at the time of the dividend."

Again as to whether seller or buyers received the dividend, the Commissioner, in said brief, states:

"To the extent that the earned surplus was represented by cash not needed by the corporation for the future conduct of its business, it would have been senseless for the buyers to pay value therefore in the form of additional consideration for the shares of stock, and then to be taxed with a dividend when the cash was withdrawn from the corporation since, as we noted, the surplus represented earnings created when the seller was in control of the corporation. It was much more realistic to do as the parties evidently did, namely, have the surplus cash paid as a dividend to the seller (whose efforts helped the corporation create the earnings) and thereby reduce the value of the shares and the purchase price to be paid by the buyers. The provisions of the agreement and the surrounding circumstances reinforce the conclusion that this is what the parties intended and that this is what they did.

"Unlike cases like *Northern Trust Co. of Chicago* and *DeGuire*, here we have an agreement which makes the application of the dividend in reduction of the purchase price depend wholly upon the depletion of assets of the corporation in the form of a dividend, etc., to the seller."

In commenting upon *Villeri* v. *Commissioner*, 133 F. 2d 905 (C.A. 5th) the Commissioner, in said brief, states:

"It would, likewise, be necessary to overcome the general rule that the one who controls the source of income is taxable on the income though the income is given to another under an existing contract."

In summary of the argument in said brief, the Commissioner states:

"Here, at the time of the dividend the seller possessed all the rights attributable to the ownership of stock, as well as the liabilities that ownership of stock brings. Moreover, it was the seller who, in addition, received the economic benefit of the dividend. He received in return all the essential rights previously noted, and retained the right to the continued receipt of his salary as president of the corporation. The dividend checks were his to dispose of as he saw fit.

"The inescapable conclusion in this case is that the greater number of attributes of ownership, at the time of the dividend, were in the seller. That is, comparing beneficial rights we cannot avoid the conclusion that of the two, it was the seller who had many more as to the shares than the buyers. It would seem he had all."

REASONS FOR GRANTING THE WRIT.

1. Confusion has arisen under the decisions involving beneficial ownership of stock at the time of declaration of dividends and this Court should clarify the position for the Commissioner and for taxpayers.

2. There is conflict between this decision on which writ of certiorari is requested and decisions of the United States Supreme Court and of the United States Court of Appeals in other circuits, as shown in the Brief of the Commissioner filed in the United States Court of Appeals

for the Seventh Circuit (a) in that there had been no sale of shares, no transfer of shares, no delivery of shares and no obligation on buyers to pay the balance of the purchase price at the time of the declaration of the dividend; (b) in that the party bound to perform the condition precedent found in the contract could not sue on the contract without proof that he had performed the condition; (c) in that it disregards holdings that the party to be taxed shall be the party possessing the more substantial attributes of ownership at the time; and (d) in that it does not seek to establish the intention of the parties as provided by decisions.

3. No consideration is given to the condition precedent, which is in conflict with many decisions of the United States Supreme Court. That a condition precedent should be considered has been recognized by the Seventh Circuit. In the case of *John K. Teaford v. Commissioner*, 246 F. 2d 73 (7th Cir.), the appeal presented the question of when a sale transaction was considered consummated for tax purposes. Agreement for sale of the partnership interest provided "The partnership * * * shall continue until the First National Bank in St. Louis, Missouri, shall in its uncontrolled discretion consent to the dissolution of the partnership, or until all of the indebtedness of said partnership to said First National Bank in St. Louis, shall have been paid." In that case, Judge Finnegan stated "From the documents of record and the testimony it clearly appears that the sale date was postponed 'until the Bank consented * * *'."

4. The decision is in conflict with the general rule that the one who controls the source of income is taxable on that income, even though the income is assigned to another, as the Commissioner points out in his Brief filed in the Circuit Court of Appeals. The seller withdrew the

surplus of the corporation theretofore earned and he should be taxed thereon.

5. The seller of stock may receive a dividend rather than a capital gain. A decision of the United States Court of Appeals (9th Cir.), *Phelps* v. *Commissioner*, 247 F. 2d 156, concerned a situation where three related automobile agency corporations having a trust as a shareholder adopted a plan whereby the trust would be eliminated by having each corporation redeem shares of the trust and also redeem shares held by individual shareholders, all in order to comply with a manufacturer's policy. All corporations had had successful operations and had paid no dividends. Yet, at the time of the distributions in redemption, the accumulated earnings and profits of each corporation were in excess of the total amount distributed. It was held that the distribution was equivalent to distribution of taxable dividends, for federal income tax purposes.

CONCLUSION.

It is respectfully requested that this Honorable Court reconsider petition for writ of certiorari.

John J. Dilloy
One North LaSalle Street
Chicago 2, Illinois
Attorney for Petitioners

CERTIFICATE.

The undersigned certifies that this petition is presented in good faith and not for delay. It is restricted to the rule governing grounds specified on petition for rehearing.

JOHN J. DILLON
One North LaSalle Street
Chicago 2, Illinois